October 19, 2016

This Fall's Supreme Court Hearings – A Missing Voice for Human Rights

By: Jennifer Koshan

Case Commented On: *Brent Bish on behalf of Ian Stewart v. Elk Valley Coal Corporation, Cardinal River Operations, et al*, SCC Case No 36636, leave to appeal granted from *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225 (CanLII)

On Monday, the Prime Minister's Office announced that Justice Malcolm Rowe of the Court of Appeal of Newfoundland and Labrador has been nominated to the Supreme Court of Canada. A question and answer session with Justice Rowe will take place on Tuesday October 25, 2016 at the University of Ottawa, and the PMO has invited two law students from every Canadian law school to attend. We will be blogging about the Q & A event on ABlawg, so stay tuned for that.

Provided Justice's Rowe's nomination is accepted, there will soon be a full slate of justices on the Supreme Court to hear this fall's appeals. The Globe and Mail ran an interesting article a couple of weeks ago noting some of this session's more interesting hearings. One case that was not mentioned is one that we have been watching on ABlawg – *Stewart v Elk Valley Coal* (see here, here and here – the case also goes by the name of *Bish*, the union member who filed a complaint on behalf of Stewart). Intervener facta were filed in *Stewart* on October 7, and there is an important set of voices missing from those arguments. On August 12, 2016, Justice Russell Brown denied intervener status to the Canadian Human Rights Commission and the Ontario Human Rights Commission, the Manitoba Human Rights Commission, the Saskatchewan Human Rights Commission and the Yukon Human Rights Commission, who had applied to intervene jointly. He granted intervener status to:

- The Council of Canadians with Disabilities and the Empowerment Council (jointly);
- The United Nurses of Alberta;
- The Construction Owners Association of Alberta, Construction Labour Relations - an Alberta Association, Enform Canada, the Electrical Contractors Association of Alberta, the Mining Association of Canada, the Mining Association of British Columbia, the Ontario Mining Association, the Northwest Territories and Nunavut Chamber of Mines and the Saskatchewan Mining Association (jointly);
- The Ontario General Contractors Association, the Ontario Formwork Association and the Greater Toronto Sewer and Watermain Contractors Association (jointly).

The fact that Justice Brown had been critical of human rights commissions while writing for his law school's blog, which was revealed at the time of his appointment to the Supreme Court in 2015, should not have swayed his decision. However, because reasons typically are not given for rejecting intervener applications, we do not know the basis for Justice Brown's decision to exclude the human rights commissions. What might the human rights commissions have added to the appeal?

The Supreme Court provides the following summary of the *Stewart* case:

> Human Rights – Right to equality – Discrimination on the basis of mental or physical disability – Whether the correct test for establishing prima facie discrimination in the context of mental disability should be applied differently to those suffering from addiction-related disabilities – Whether there is inter-jurisdictional consistency in the application of that legal test and across factual contexts – Whether the correct test to establish the defence of justification of a discriminatory standard as a bona fide occupational requirement should be applied differently to addiction-related disabilities – Whether there is inter-jurisdictional consistency in the application of that legal test and across factual contexts – *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union*, [1999] 3 S.C.R. 3 – *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 – Alberta Human Rights Act, R.S.A. 2000 c. A-25.5, s. 7.
>
> A worker was terminated from his employment with Elk Valley Coal Corporation when he tested positive for cocaine after a loader truck he was operating struck another truck. He had previously attended a training session and acknowledged his understanding of the employer's policy of allowing workers with a dependency or addiction to seek rehabilitation without fear of termination, provided they sought assistance before an accident occurred. The worker admitted to regular use of cocaine on his days off but didn't think he had a drug problem prior to the accident and testing. His union filed a complaint with the Alberta Human Rights Commission, claiming the worker was fired on account of his addiction disability. The tribunal concluded that while the complainant's drug addiction was a disability protected under the legislation, there had been no prima facie discrimination. The worker was not fired because of his disability, but because he failed to stop using drugs, stop being impaired at work, and did not disclose his drug use. Alternatively, the tribunal held that the employer had shown accommodation to the point of undue hardship.
>
> The Court of Queen's Bench of Alberta dismissed the appeal from the decision of tribunal but disagreed with the alternative conclusion that the worker had been reasonably accommodated. A majority of the Court of Appeal of Alberta dismissed the appeal and allowed the cross-appeal.

Under section 57(2) of the *Rules of the Supreme Court of Canada*, SOR/2002-156, a motion for intervention shall:

> **(a)** identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and
>
> **(b)** set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the *reasons for believing that the submissions will be useful to the Court and different from those of the other parties* (emphasis added).

Given that two of the issues in the case concern the "inter-jurisdictional consistency" in the application of the key legal tests in human rights cases – the test for establishing *prima facie* discrimination and the test for establishing a *bona fide* occupational requirement – one would have thought that human rights commissions could have provided a useful perspective. The test

for *prima facie* discrimination in particular has been the subject of much toing and froing since the 2000s, due in large part to the influence the test for discrimination under the *Charter* has had in human rights matters, such that considerations of stereotyping and arbitrariness have crept in (see my article on that subject here). Recent decisions of the Supreme Court in cases such as *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII) have not explicitly clarified the test in spite of calls to do so, leading to ongoing confusion at the lower court and tribunal levels, as exemplified in *Stewart* and an earlier Alberta Court of Appeal case on addiction-related disabilities, *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 (CanLII), leave to appeal denied, 2013 CanLII 15573 (SCC).

The Alberta Human Rights Commission, which is a respondent in *Stewart*, restricts its factum to the issue of standard of review. This issue is also an important one – as indicated by the Federal Court of Appeal in *Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200 (CanLII) at para 78, there is a "sorry state of the case law and [a] lack of guidance on when decisions of human rights tribunals interpreting provisions in human rights legislation will be afforded deference" (see also here for Shaun Fluker's post on the handling of standard of review in *Stewart*). As important as this issue is, Justice Brown's decision to deny intervener status to the other commissions means that the *Stewart* appeal lacks their collective expertise on the inter-jurisdictional (in)consistency in the key legal tests in human rights cases.

The intervener factum of the Council of Canadians with Disabilities and the Empowerment Council focuses on the contextual application of the test for discrimination and the *bona fide* occupational requirement test to persons with addiction-related disabilities. It is also a very important submission, but it does not deal with inconsistencies in the actual test for *prima facie* discrimination.

Predictably, the factums of the employer-side interveners – The Construction Owners Association of Alberta, Construction Labour Relations - an Alberta Association, Enform Canada, the Electrical Contractors Association of Alberta, the Mining Association of Canada, the Mining Association of British Columbia, the Ontario Mining Association, the Northwest Territories and Nunavut Chamber of Mines and the Saskatchewan Mining Association (jointly); and The Ontario General Contractors Association, the Ontario Formwork Association and the Greater Toronto Sewer and Watermain Contractors Association (jointly) – support a test for discrimination that includes considerations of arbitrariness and stereotyping, contrary to the traditional approach to *prima facie* discrimination (see Factum of the Construction Owners Association of Alberta et al at para 7; Factum of the Ontario General Contractors Association et al at para 7). I am not saying these factums are unimportant – they highlight the challenges in balancing the interests of employees with addictions and the interests of others in the context of safety-sensitive workplaces. But these are concerns that go to whether drug and alcohol policies can be defended as *bona fide* occupational requirements, and should not be used to displace or subvert the proper test for discrimination.

The only intervener factum which deals with the test for discrimination is that of the United Nurses of Alberta (UNA). It supports the Appellant's position that a majority of the Alberta Court of Appeal misstated the test for discrimination in *Stewart*, in part by relying on considerations of stereotyping and arbitrariness, which improperly import employer intent into the inquiry and make it impossible to prove adverse effects discrimination (at para 21). The UNA also makes a compelling argument that many cases involving addiction-related disabilities have been improperly dealt with via a disciplinary model, which treats addiction-related conduct as

culpable rather than viewing it through a human rights lens (at paras 5-9). More generally, the UNA compares the approach taken in addiction-disability cases across Canada, providing some basis for the Supreme Court to consider the inconsistencies in applying the test for *prima facie* discrimination in this context.

This comparative approach, and the need for tribunals and courts to interpret the test for discrimination broadly and purposively regardless of the grounds in question, are surely matters on which the human rights commissions could have usefully contributed given their unique roles in the human rights system.

This post may be cited as: Jennifer Koshan, "This Fall's Supreme Court Hearings – A Missing Voice for Human Rights" (October 19, 2016), on-line: ABlawg, http://ablawg.ca/wp-content/uploads/2016/10/Blog_JK_StewartHRC_Oct2016.pdf